No. 82-382

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In the Supreme Court of the United States

OCTOBER TERM, 1982

MYRA B. ROBINSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question in this gift tax case is whether petitioner, who was a Texas resident, made a completed gift in 1976, when she released her power of appointment over the remainder interest in a testamentary trust which had been created four years earlier under the provisions of her husband's will. The corpus of the trust consisted of petitioner's

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* Petitioner has erroneously named the United States as the respondent in the caption of the petition in this case. The case came to the court of appeals on appeal from a decision of the United States Tax Court, where, as required by the rules of that court, the Commissioner of Internal Revenue was named as respondent (Pet. App. A-17). Rules of Practice and Procedure of the United States Tax Court, Rule 60(b) (Jan. 1, 1974). The caption of the case in the court of appeals, likewise, correctly reflected the fact that the Commissioner of Internal Revenue was the appellee (Pet. App. A-1).

share of the community property at the time of her husband's death, which had been contributed to the trust pursuant to petitioner's election to accept the provisions of her husband's will in lieu of her share of the community property.

The pertinent facts, all of which were stipulated, may be summarized as follows: Petitioner was married to G.R. Robinson, who died testate on February 27, 1972 (Pet. App. A-18). Under the will of G.R. Robinson, petitioner was given a choice between accepting the benefits provided for her under his will and thereby consenting to the disposition of her share of the community property as provided in the will, or taking her share of the community property and receiving only a specific bequest of personal effects under the will (Pet. App. A-18). On August 22, 1972, petitioner elected to accept the benefits provided for her under her husband's will (Pet. App. A-18). Pursuant to this election and the terms of her husband's will, petitioner transferred her share of the community property to the "Myra B. Robinson Trust, the trust at issue in this case (Pet. App. A-18). Under the terms of the trust instrument (which was one of the clauses of her husband's will), petitioner was entitled to receive all the income from the trust during her lifetime, and she retained the power to appoint all or any part of the corpus of the trust to her children, to the surviving spouse of any deceased child, or to charity (Pet. App. A-3, A-18, A-20).

On March 26, 1976, petitioner released her retained power of appointment over the corpus of this trust (Pet. App. A-6, A-20). On audit, the Commissioner of Internal Revenue determined that this release was a taxable gift of the remainder interest in the trust because in executing the release she relinquished her dominion and control over that interest and fixed the rights of the remaindermen named in her husband's will (Pet. App. A-19, A-24).

In this proceeding brought by petitioner in the Tax Court for redetermination of the Commissioner's deficiency determination, the Tax Court upheld the Commissioner. It rejected petitioner's contention that she was entitled to offset the value of the remainder against the value of the income interest in her husband's trust (a separate trust created out of her husband's share of the community property under the provisions of his will) which she had received when she elected to accept the provisions of his will in 1972 (Pet. App. A-25). As the court pointed out (*ibid.*), petitioner was under no obligation to release her power of appointment over the assets of the Myra B. Robinson Trust in order to receive the income interest in her husband's trust. When she elected to take under her husband's will, she gave up control of the corpus of the trust during her lifetime, but she retained the power of appointment in issue in this case. After she began receiving the income from her husband's trust she retained the right to decide, through the exercise of her power of appointment, which of the beneficiaries named in her husband's will would receive her share of the community property and how much each would receive. Her release of that power in 1976 was entirely gratuitous, and, since it fixed the rights of the beneficiaries, it was a completed gift subject to the federal gift tax (Pet. App. A-25, A-26).

The court of appeals affirmed. The court rejected petitioner's contention that the power of appointment which she had released in 1976 was a special power of appointment, which could be released without incurring any gift tax liability as provided by Section 2514 of the Internal Revenue Code of 1954 (26 U.S.C.), and Treasury Regulations on Gift Tax (1954 Code), Section 25.2514-3(e) (26 C.F.R.). As the court pointed out (Pet. App. A-4), petitioner was the legal owner of her one-half interest in the community property, and, when she transferred her share

of the community property to the Myra B. Robinson trust by electing to take under her husband's will, she retained the power to control the disposition of the trust property by exercising or releasing her power of appointment (Pet. App. A-9). Because of this reserved power of apppointment, the election which petitioner made in 1972 did not deprive her of dominion and control over the remainder of the trust (Pet. App. A-9). Therefore, the release of her reserved power of appointment in 1976 was the taxable event which was subject to the gift tax under Section 2501 of the Internal Revenue Code. This transfer was not exempt under Section 2514 because the rights transferred had been a reserved incident of petitioner's community property ownership and had not been donated to her by her husband (Pet. App. A-10, A-11).

1. The decision below correctly held that petitioner's release of her power of appointment was a taxable gift. Petitioner errs in her assertion (Pet. 7-8) that the decision below in this case conflicts with *Commissioner* v. *Estate of Nelson*, 396 F.2d 519 (2d Cir. 1968); *Estate of Davis*, 440 F.2d 896 (3d Cir. 1971); and *Estate of Christ* v. *Commissioner*, 480 F.2d 171 (9th Cir. 1973). All of these cases involved the estate tax consequences of transfers of property with retained life estates made by the respective decedents. At issue in each case was an essentially factual dispute as to whether the transfer of property constituted a bona fide sale for an adequate and full consideration, in which event the value of the property transferred would not be includable in the decedent's gross estate under Section 2036(a) of the Internal Revenue Code of 1954. The court of appeals here did not question the existence or adequacy of the consideration which petitioner received in 1972 when she elected to take under her husband's will. Rather the court held, and correctly so, that the release in 1976 of her

reserved power of appointment over the assets previously transferred by petitioner was wholly gratuitous and constituted a taxable gift (Pet. App. A-8, A-9).

2. Petitioner's attempt (Pet. 8, 12) to have her husband regarded as the transferor of her interest in the community property because she elected to take under his will in 1972 reflects a fundamental misunderstanding of her rights under Texas community property law. Petitioner had a vested one-half interest in all community property accumulated during her marriage. *Commissioner* v. *Chase Manhattan Bank*, 259 F.2d 231, 238-239 (1958), cert. denied, 359 U.S. 913 (1959). This interest was not subject to her husband's testamentary power, and it was not includable in his gross estate for federal estate tax purposes. *Lang* v. *Commissioner*, 304 U.S. 264 (1938). Thus, the court of appeals correctly held (Pet. App. A-11) that petitioner, and not her husband, was the owner of her share of the community property—the property which she transferred to the Myra B. Robinson Trust when she elected to take under her husband's will. See *Estate of Christ, supra*, 480 F.2d at 172. Accordingly, the court correctly concluded (Pet. App. A-9, A-10) that the power which she retained to direct the disposition of the assets of that trust was a reserved power of appointment, and was not subject to the limitations of Section 2514 of the Internal Revenue Code on the taxability of the exercise or release of a donated power of appointment. See Treasury Regulations on Gift Tax (1954 Code), Section 25.2514-1(b)(2) (26 C.F.R.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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